Supreme Court, U.S.
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No. 02-316

In The
Supreme Court of the United States

DONALD R. WILD and DIANA H. WILD,

Petitioners,

v.

SUBSCRIPTIONS PLUS, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS HEART OF TEXAS DODGE, INC.'S AND UNIVERSAL UNDERWRITERS INSURANCE COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a transfer under 28 U.S.C. § 1406(a) of a multi-defendant lawsuit proper where the transferor court has determined that venue in the district of the transferor court was improper under 28 U.S.C. § 1391(a) and only one of the defendants is not subject to the transferee court's personal jurisdiction?

CORPORATE STATEMENT

Pursuant to Rule 29.6, Respondent Heart of Texas Dodge, Inc. ("Heart of Texas"), has no parent corporation and there are no publicly held companies that own 10% or more of its stock. The parent company and owner of more than 10% of the stock for Respondent Universal Underwriters Insurance Company, properly identified as Universal Underwriters of Texas ("Universal"), is Zurich American Insurance Company.

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STATEMENT OF THE CASE

The Petitioners Donald and Diana Wilds' ("the Wilds") Statement of the Case does not state all of the relevant facts, and includes arguments and allegations irrelevant to the question presented to this Court.

Respondent/defendant Allstate Insurance Company ("Allstate") brought a motion before the Louisiana district court seeking, among other things, to transfer this case from Louisiana to Wisconsin pursuant to 28 U.S.C. § 1406(a) on the grounds that Louisiana was not a proper venue for this matter under 28 U.S.C. § 1391. The Wilds' only argument in opposition to Allstate's motion was that venue was proper. The Wilds did not challenge the legality of transferring the case to Wisconsin. The Louisiana district court held that venue was not proper in the Eastern District of Louisiana, and that it was in the interests of justice to transfer the matter to Wisconsin. The transfer of the case to Wisconsin was completed on February 1, 2000.

The Wisconsin district court received the action from the Louisiana district court on February 1, 2000. (Record 1.) On April 14, 2000, the Wilds filed an amended complaint that differed from the original complaint. Among other things, it added allegations establishing proper venue in the Wisconsin district court and personal jurisdiction over each of the defendants, including respondent/defendant Karleen Hillery ("Hillery"). (Record 19.) On May 15, 2000, respondent/defendant Progressive Northern Insurance Company answered the amended complaint and asserted as an affirmative defense that the Wisconsin district court lacked personal jurisdiction over Hillery.

(Record 22.) Approximately five months after the affirmative defense asserting lack of personal jurisdiction over Hillery was raised, Hillery moved for summary judgment on the claims against her on the ground that the Wisconsin district court lacked jurisdiction over her. The Wilds opposed the motion, arguing that the Wisconsin district court did have jurisdiction over Hillery. (Record 116.) The Wisconsin district court, in a decision dated December 6, 2000, granted Hillery's motion in a decision that also granted summary judgment against the Wilds on virtually every single claim against each of the defendants, including Heart of Texas and Universal. (Pet. App. D.) Only at that time – roughly eight months after the Wilds were put on notice that the Wisconsin district court may not have had personal jurisdiction over Hillery, and having lost most of their claims against the various defendants – did the Wilds first assert that the question of whether or not one or more of the various defendants was not subject to personal jurisdiction was relevant to the issue of whether or not the transfer from Louisiana to Wisconsin was proper. (Pet. App. C.)

SUMMARY OF THE ARGUMENT

Heart of Texas and Universal assert that this case is unique and the decision of the Seventh Circuit was narrowly tailored to deal with the specific issues of this case. The decision of the Seventh Circuit, contrary to the Wilds' assertions, is not in conflict with this Court's decision in *Hoffman v. Blaski*, 363 U.S. 335 (1960), nor does it conflict with the decisions of the other circuits.

As distinguished from *Blaski*, this case does not present a situation where venue and/or jurisdiction are lacking over all defendants. Rather, this is a case that "could have been brought" in the Wisconsin district court, except for as against one of the 13 defendants due to lack of personal jurisdiction over the one defendant.

This case also differs from the circuit court cases cited by the Wilds in that the Wilds failed to timely raise any objections to the transfer based on lack of personal jurisdiction and/or venue over the defendants. The parties opposing transfer in the cited circuit court cases made timely objections to the propriety of the proposed transfers.

ARGUMENT

The issue raised by the Wilds is whether a transfer under 28 U.S.C. § 1406(a) is invalid even though venue is proper as to all defendants in a multi-defendant case, but personal jurisdiction is lacking over one of the 13 defendants. The Seventh Circuit held that the transfer in this case was proper, which the Wilds dispute, asserting that the Seventh Circuit's conclusion conflicts with this Court's decision in *Hoffman v. Blaski*, 363 U.S. 335 (1960) and with the decisions of other circuits. The Wilds' assertions are incorrect. *Blaski* and the circuit court cases cited by the Wilds in their petition factually differ from this case, and properly played no role in the Seventh Circuit's decision.

In this case, it is undisputed that venue was proper in the Wisconsin district court as to all 13 defendants. It has also never been disputed that the Wisconsin district court

had personal jurisdiction over 12 of the 13 defendants. The Wisconsin district court's jurisdiction decision was not the last word on the issue. A Wisconsin state court, addressing the identical personal jurisdiction issue in a lawsuit arising out of the same subject accident and involving the same defendants, later ruled that Hillery was subject to personal jurisdiction in Wisconsin. (*See* Pet. App. A.)

Based on the very specific facts of this case, the Seventh Circuit held that the lack of jurisdiction over one of 13 defendants did not make the transfer improper, entitling the Wilds to a "retransfer" back to Louisiana. *Blaski* did not address the very narrow issue before the Seventh Circuit, which was whether lack of jurisdiction over one of 13 defendants where venue was proper as to all defendants required retransfer. Rather, *Blaski* addressed the more basic issue of whether an action can be transferred to a district where neither venue *nor* jurisdiction is proper as to *any* defendant. 363 U.S. at 341; *Van Dusen v. Barrack*, 376 U.S. 612, 620 (1965) (*Blaski* "held that, despite the defendant's waivers or consent, a forum which had been improper for *both* venue *and* service of process was not a forum where the action 'might have been brought'" for the purposes of sec. 1404(a)) (emphasis added). The Court held that where both venue and jurisdiction are lacking as to all defendants, the action is not one that "might have been brought" in the transferee court and the action could not be transferred. *Id.* In such circumstances, if the original action had been filed in the transferee court to begin with, the *entire action* would have had to have been dismissed because it could not be maintained against *any* defendant.

In contrast, had this lawsuit originally been filed in the Wisconsin district court, the *action* as a whole would

have properly proceeded in that court (with summary judgment ultimately being entered against the Wilds). The action clearly "could have been brought" in the Wisconsin district court.

This case is also distinguishable from each of the other circuit court cases cited by Wilds in their petition. None of the plaintiffs in those cases clearly waived an established right to challenge the transfer on venue or jurisdiction. *See Blaski*, 363 U.S. 335; *Chrysler Credit Corp. v. Country Chrylser, Inc.*, 928 F.2d 1509 (10th Cir. 1991); *Shutte v. Armco Steel Corp.*, 431 F.2d 22 (3rd Cir. 1970); *Sharp Electronics Corp. v. Hayman Cash Register Co.*, 655 F.2d 1228 (D.C. Cir. 1981); *Liaw Su Teng v. Skaarup Shipping Corp.*, 743 F.2d 1140 (5th Cir. 1984). Additionally, none of the plaintiffs in *Blaski* or the circuit court cases cited by the Wilds ever claimed that venue and/or jurisdiction was in fact proper in the transferee court.

The Wilds have waived their current arguments as they did not raise them in a timely manner. They could have objected to the transfer in the Louisiana district court on the grounds that the moving party (Allstate) had not demonstrated that venue and jurisdiction were proper in the transferee court, but they did not. The Wilds could have raised the propriety of the transfer based on lack of jurisdiction over Hillery when the first answer to their amended complaint was filed raising lack of personal jurisdiction as an affirmative defense. Again, they did not. Similarly, instead of arguing that jurisdiction did exist in response to Hillery's summary judgment motion, the Wilds could have asked the court to stop the proceedings so that they could challenge the transfer based on Hillery's claim of no jurisdiction. The Wilds didn't do any of these things

and now wish to turn back the hands of time to revive their dead claims. The Wilds knew, or certainly should have known, that the rule in the Seventh Circuit was that objections to transfers based on venue and/or jurisdiction grounds are waived if not timely pursued. *National Standard Co. v. Adamkus*, 881 F.2d 352 (7th Cir. 1989). Under these circumstances, the Wilds clearly waived any right to challenge the transfer on the grounds that the court lacked personal jurisdiction over one of 13 defendants.

These respondents further adopt herein as though more fully set forth all other briefs filed by the other respondents, and the arguments raised therein in opposition to the Wilds' petition.

CONCLUSION

In conclusion, the Seventh Circuit's decision is quite narrow and limited to the unique facts presented by this case. The facts of this case, and particularly the Wilds' waiver of their challenge to the propriety of the transfer, are distinguishable from *Blaski* and the circuit court cases cited by the Wilds in their petition. These respondents respectfully request that the Wilds' petition be denied.

Respectfully submitted,

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